



The Problem of Mode in Declaration of Intent in Islamic Law

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Abstract

Declaration of a person's intent constitutes the foundation of all legal actions. Intent becomes legally binding only after it is expressed. Regarding certainty and clarity there are differences between modes or forms of speech. Islamic law uses the term *sarih* to indicate perfect clarity and certainty in the expression. For the majority of scholars the past tense mode is the most appropriate form of a *sarih* expression.

Neither the Qur'an nor the *Sunnah* requires the usage of a particular mode in declaration of intent. According to Islamic law, the common usage of people or the custom (*al-'urf*) is a valid legal source in the matters that no evidence from the Qur'an or the *Sunnah*. Thus the determining criterion of the clarity and certainty of an expression in legal actions should be custom regardless of its mode.

Key words: intent, declaration of intent, mode, explicit, custom('urf).

Introduction

A great significance has been attached to the form of the 'declaration of intent' in Islamic legal sources, and discussed in length on the ground that the manifestation of a legal act should depend on an explicit statement but not on an inner intention which is in essence merely

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an abstraction exists inside a person where no legal rule can be applicable.¹

In some legal sources it is argued that a legal act can be established only by a statement made in past tense indicative mode of a verb, the *al-mâdî* in Arabic and it is not possible to originate an agreement with a statement made in other than the past tense mode. In this article this idea will be discussed comparatively with alternative approaches found in classical Islamic legal literature and will be challenged in the light of modern legal thinking.

There is information on the problem of mode of the verb in declaration of intent in almost all of the classical legal sources as well as modern literature: Ibnu'l-Humâm's (d. 861/1457) commentary *Fathu'l-qadîr* on *al-Hidâyah*, which is considered one of the main sources of Hanafî school of law, attracts attention as one of the most comprehensive work on the issue. Qarâfî and Ibnu'l-Qayyim (d. 684/1285) discusses the issue on the level of *'urf* (custom) instead of linguistic plane. A modern scholar Wahîdu'd-dîn Siwâr's doctoral dissertation *at-Ta'bir 'an al-İrâdah fi'l-Fiqhi'l-Islâmî* (Declaration of Intent in Islamic Law)² gives a detailed information on the issue comparatively with western legal thinking.

I. The Importance of Intent (*İrâdah*) In Legality of An Action

According to Islamic legal theory any legal act or procedure should depend on consent (*ridâ*).³ This is because God says in the Qur'ân: "O ye who believe! Eat not up your property among yourselves in vanities: But let there be amongst you traffic and trade by mutual consent."⁴ Although in the verse "trade" is mentioned apparently, it is perceived that the verse embraces any contract which gives responsibility over two parties.⁵ A *hadith* of the Prophet supports this interpretation of the verse which says "Property of a person (someone else) is not lawful without the good

¹ This is one of the indications of the objectivity of Islamic law according to as-Sanhûrî, Abdu'r-Razzâq, *Masâdiru'l-Haqq fi'l-Fiqhi'l-Islâmî*, Dâru'l-Fikr, I, 84.

² Siwâr, Wahîdu'd-Dîn, *at-Ta'bir 'an al-İrâdah fi'l-Fiqhi'l-Islâmî*, Maktabatun-Nahdati'l-Misriyyah, Misir 1960.

³ *İrâdah* has been conveyed by the concepts of *ridâ* and *ikhtiyâr* in classical sources.

⁴ Nisâ', 4/29

⁵ Al-Jassâs, Ahmad ibn 'Ali, *Ahkâmü'l-Qur'ân*, ed. by Muhammad as-Sâdiq Qamhâvi, al-Qâhirah, n.d., II, 128-129; Ibnu'l-'Arabî, Muhammad ibn Abdullah, *Ahkâmü'l-Qur'ân*, Dâru'l-Kutubi'l-İlmiyya, Bayrût, I, 521; el-Kurtubî, Muhammed ibn Ahmad, *al-Jâmi' li Ahkâm al-Qur'ân*, Dâru'l-Kâtib al-'Arabî, al-Qâhirah 1967, V, 151,152; Yazır, Hamdi, *Hak Dini Kurân Dili*, 2. edition, Nebioğlu Basımevi, 1960, II, 1343.



pleasure of his heart.”⁶ Moreover, according to following verse only *irâdah* can constitute the legal basis of a contract, even if it is a one-sided one: “And give the women (on marriage) their dower as a free gift; but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer.”⁷ The Hanbalî jurist Ibnu’l-Qayyim (d. 751/1350) and Malikî jurist ash-Shâtibî (d. 790/1388) illustrate the meaning of the *hadith* “The actions⁸ are (only, certainly) tied to the intents and every person will earn that which he intended,”⁹ as follows: The intent (*irâdah*) is the spirit and essence of an action and an action without intent looks like to a corps without spirit, thus there is no legal implication of an action without intent.¹⁰ For this reason, any statement made by a person, who is mentally ill or in a state of unconsciousness such as sleeping or fainting, or did not reach puberty does not have any legal value. A statement can convey a legal value only if there is intent behind it, in other word if it is a manifestation of intent (*irâdah*). Therefore, neither an action without intent, nor intent without an action conveys any legal meaning or value.

II. The Definition of Declaration of Intent

In order to create a legal consequence *irâdah* (will, intent or consent) has to be manifested thorough one of the means of declaration. A will or intent or consent which is not revealed but remained a man’s inner world, thus not known by other than himself, cannot create a legal effect. In this context al-Zanjânî (d. 656/1258) maintains that since an agreement loading a debt on two parties depend on *ridâ’* (consent), and consent is a hidden entity exists only a man’s inner world, the God’s wisdom directs people toward using ‘offering (*ijâb*) and accepting (*qabûl*)’¹¹ as an objective indication of their consent which we call ‘declaration of intent’.¹²

⁶ Ahmad ibn Hanbal, *Musnad*, V, 72.

⁷ Nisâ’, 4/4.

⁸ The word of ‘amal in the *hadith* refers to any action manifested through the tongue or any other organ of a person, thus includes declaration of intention. For more information look at al-Qirqağajî, Sulayman, *Sharhu’l-Khâtima*, p. 3; Bilmen, Ö. Nasuhi, *Hukuk-ı İslamiyye ve İstilahât-ı Fikhiyye Kâmusu*, Bilmen Yayinevi, İstanbul, 1967, I, 254, 255.

⁹ *Al-Bukhârî*, Bad’u’l-Wahy I, İmân 41; *al-Muslim*, İmârah 155.

¹⁰ Ibn Qayyim al-Jawziyyah, Muhammad ibn Abi-Bakr, *I’lâmu’l-Muwaqqi’în*, Dâru’l-Jil, Bayrût, III, 111; ash-Shâtibî, İbrâhîm ibn Mûsâ, *al-Muwâfaqât fi Usûli’l-Ahkâm*, Matbaatu’l-Madanî, al-Qâhirah 1969, II, 253.

¹¹ The first one of two declaration of intent in establishing an agreement is called *al-ijâb* while the second one is called *al-qabûl*. (‘Ali al-Khaffî, *Ahkâmu’l-Mu’âmalât ash-Shar’iyyah*, 3rd edition, Dâru’l-Fikr, p. 169)

¹² az-Zanjânî, Mahmûd ibn Ahmad, *Takhrîju’l-Furû’ ‘ala’l-Usûl*, edited by Muhammad Adîb Sâlih, Dimashq 1962, s. 62.



Almost all of Islamic legal scholars agree that to be able to originate a legal act, it is mandatory to declare the consent about it, because as long as it is not declared by words it would not be possible to know it, thus to tie to a legal consequence. This opinion is reached by interpretation of the following *hadith*¹³: “Truly, God does not hold you responsible because of the things cross on your mind unless they are manifested as an act or a word.”¹⁴

For Hanefi school of law the only constitutive element of a legal act, and its *raison d'être* (reason for existence) is a ‘will or intent or consent’ embodied by a declaration¹⁵ which is called ‘declaration of intent’. In modern legal literature a legal act is described as “One or more persons, within the limits prescribed by the rule of law directed to bear the legal consequences of a declaration of intent or statements in legal cases.”¹⁶ This definition is perfectly harmonious with the Hanafî approach to the issue.

III. The Types of Declaration of Intent

In Islamic legal sources the declaration of intent is divided into two types as ‘*sarih* declaration of intent’ and ‘*kinâyah* declaration of intent’ from the point of its transmission of the meaning explicitly or implicitly.

A. The *sarih* Declaration of Intent

Sarih linguistically means “clear/open,” “explicit” and “evident”. A palace is called “الصرح” in Arabic because of its height and obviousness than other building around it.¹⁷ As a legal expression in Islamic law and legal theory an open declaration of intent is an utterance that the meaning of it is clear because of its common usage among people.¹⁸ There is only one possible meaning of a *sarih* declaration¹⁹ and this meaning is evident in a degree that one who hears it understands immediately without any

¹³ Sarakhsi, *al-Mabsût*, 2nd edition, Dâru'l-Ma'rifah, XIII, 46; Kâsânî, *Badâi'u's-Sanâi' fi Tertîbi'sh-Sharâi'* 1st edition, Dâru'l-Kutub al-'Ilmiyyah, Bayrût 1997, VII, 367, 368.

¹⁴ Bukhârî 'Itq, 6, Talâq 11; Muslim İmân 201, 202, Abû Dâwûd Talâq 15; Tirmizî Talâq 8.

¹⁵ 'Ali al-Khafif, *Ahkâmû'l-Mu'âmalât*, footnote #1 at p. 172.

¹⁶ Eren, Fikret, *Borçlar Hukuku Genel Hükümler*, 6th edition, Beta Yayınları, İstanbul 1998, I, 115.

¹⁷ An-Nasafî, Hâfîzu'd-Dîn 'Abdullâh ibn Ahmad, *Kashfu'l-Asrâr Sharhu'l-Musannif ala'l-Manâr*, İhsan Kitabevi, İstanbul 1986, p. 242.

¹⁸ Al-Hanbalî, Shâkir, *Usûlu'l-Fiqh'l-Islâmî*, İstanbul, n.d., p. 176; Zaydân, Abdu'l-Karîm, *al-Wajîz fi Usûli'l-Fiqh*, Matbaatu Salmân al-'Azamî, Baghdâd 1973, p. 283.

¹⁹ As-Suyûtî, Jalâlu'd-Dîn Abdu'r-Rahmân, *al-Ashbâh wa'n-Nazâir*, Dâru Ihyâi'l-Kutubi'l-'Arabîyyah, 'Isâ al-Bâbî al-Halabî wa Shurakâh, p. 318.



ambiguity.²⁰ A declaration of intent in this degree of obviousness would be conceived identical with the intent itself and creates a legal consequence without searching the aim of the speaker of such a *sarîh* declaration further.²¹

B. The *kinâyah* Declaration of Intent

Kinâyah (metaphor) linguistically means to tell something indirectly and implicitly or saying something but mean something else.²² As a legal idiom “metaphorical expression” is an utterance which implies a meaning that can only be understood by a means of connecting evidence (*qarînah*), since its rare usage.²³ Although the dictionary meaning of a metaphorical expression would be “obvious and clear,” there always be an ambiguity and uncertainty about what is the exact purpose of its use by its speaker.²⁴ This is because a metaphorical expression has the implication of what the speaker actually means as well as a meaning other than that specific meaning.²⁵

The uncertainty of a metaphorical utterance can be removed by identifying the intent of the speaker through connecting evidence. The legal result of this utterance can be determined after the removal of uncertainty from the utterance.²⁶

The main criterion in determining whether a declaration of intent is explicit or implicit is its frequency and custom (*urf*).²⁷ According to Ibnu'l-Qayyim the custom can function to turn a metaphorical expression to an explicit one and vice versa.²⁸ A Hanafî jurist Imam Muhammad (d. 189/805) maintains that divorcing takes place as a result of the expression “May everything *halâl* turn *harâm* for me” despite it is a metaphorical

²⁰ Az-Zayla'î, Usmân ibn 'Alî, *Tabyînu'l-Haqâiq Sharhu Kanzî'd-Daqâiq*, 2nd edition, Bayrût, Dâru'l-Ma'rîfah, II, 197.

²¹ Ibn Malak, Abdu'l-Latîf ibn 'Abdu'l-'Azîz, *Sharhu'l-Manâr*, Dar-sa'âdat, 1315, p. 512, 513.

²² Asim Efendi, *Kamus Tercümesi*, IV, 1155.

²³ Zaydân, *al-Wajîz*, p. 283.

²⁴ Shâkir al-Hanbalî, *Usûlu'l-Fiqhî'l-Islâmî*, p. 178.

²⁵ al-Marghinânî, 'Ali ibn Abî Bakr, *al-Hidâyah Sharhu Bidâyatî'l-Mubtadî*, Misr n.d., I, 241; Suyûtî, *al-Ashbâh*, 318.

²⁶ Ar-Rahâwî, Yahyâ, *Hâshiyatu'r-Rahâvî ala'l-Manâr* (with Sharhu Ibn Malak), Dar-sa'âdat, 1315, p. 514, 515.

²⁷ Al-Bukhârî, 'Abdu'l-'Azîz ibn Ahmad, *Kashfu'l-Asrâr 'an Usûli Fakhri'l-Islâm al-Bazdawî*, 2nd edition, Dâru'l-Kutubi'l-'Arabi, Bayrût 1994, I, 166; Mullâ Jiwân ibn Abî Sa'id, *Nûru'l-Anwâr ala'l-Manâr* (same printing) Istanbul 1986, p. 242, 243; al-Izmîrî, Sulaymân, *Hâshiyah 'alâ Mîr'âti'l-Usûl Sharhu Mirqâti'l-Wusûl*, Bulâq 1358, II, 66, 67; Abu's-Sunnah, Ahmad Fahmî, *al-'Urf wa'l-'Âdah fi Ra'yi'l-Fuqahâ'*, 2nd edition, 1992, p. 194.

²⁸ Ibn Qayyim, *I'lâmu'l-Muwâqqi'in*, III, 78.



idiom. The scholars of *Balkh* of later times give fatwa (opinion) that divorcing takes place with this expression whether there is intent behind it because of common/frequent usage of it for this purpose. This shows us that a metaphorical expression can turn to an explicit one because of the change in the custom of the society in the usage of that expression.²⁹

According to al-Qârâfi (d. 684/1285) in a circumstance that an old money has been extinct from circulation and new money became a custom among people, if an agreement of sell has been made without specifying the kind of money in exchange, the buyer should pay the cost in the brand of new money because an explicit expression can turn to be metaphorical and vice versa as the time passed. He adds that "(...) Then take into account newly appeared every customs and leave the one got out of the use. Do not be frozen (do not insist) on applying the customs written in the books for your entire life (...). To be frozen on the customs written in the book is an error about the religion and misunderstanding the goals of the Muslim scholars and the predecessors (*salaf*) (...). ... The decisions related to the modes of *sarîh* and *kinâyah* needs to be made according to this rule because sometimes a *sarîh* turns to a *kinâyah* which needs to an intention (*niyyah*) while a *kinâyah* turns to a *sarîh* which does not need an intention."³⁰

Because of these recommendations Ibn Qayyim expresses his admiration for Qarâfi by saying "This is the essence of law (*fiqh*)" and emphasize the importance of the custom as follows: "Despite the differences in time, place and situations and despite the diversity of people's customs the one who gives fatwa according to the narratives found in the books only goes astray not himself only but also drives the others to off course, too. The crime committed by such a person against the religion is bigger than a doctor's crime who applies the same treatment, according the information found in a book, for all the people without taking into account the differences in their customs and characters and the differences in time and place. Such doctors and such *muftis* are the most harmful persons against the bodies and the religions of people respectively."³¹

²⁹ Abu's-Sunnah, *al-'Urf wa'l-'Âdah*, p. 194, 195.

³⁰ Al-Qarâfi, Shihâbu'd-Dîn Abu'l-Abbâs, *al-Furûq*, Dâru'l-Ma'rifah, Bayrût, n.d., I, 176, 177.

³¹ Ibn Qayyim, *I'lâmu'l-Muwaqqi'in*, III, 78.



IV. The Concept of Mode/Mood

In this section we will not examine all aspects of the issue of mode/mood and tense in Turkish and Arabic but refer to it briefly in relation to the subject of this article.

A. The Modes of Speech in Turkish

A verb is a part of speech which informs us about an action in relation to time and person. There are two main associations of a verb, action and time. The action is understood through the root of the verb while the time through the mode of the verb. For this reason frequently mode and time (tense) are used interchangeably.

Moods or modes in verbs are the forms of a verb that indicates its manner of doing or being in relation to time and person. All modes of verb which we need to elaborate in the context of this article can be categorized under two main categories: indicative and subjunctive.

1. Indicative Modes

- a) Past: This mode is used to inform an action in the past which has seen while it was happening or an action which is known as if seen.
- b) Present Continuous: It expresses an action while it is taking place.
- c) Future: It informs that an action will take place after it is articulated.
- d) Simple present: It informs an action which extends before and after the time of speech.

2. Subjunctive Mode

Imperative: It is used to order an action being done. The subjunctive modes, unlike indicatives, do not suggest any time openly. Nevertheless they implicate the upcoming time. As a subjunctive mode



the imperative implicates an action has to be done after the time of speech.³²

B. The Modes in Arabic (الصيغة)

Unlike other languages, in Arabic a mode of verb suitable to convey more than one tense since it indicates primarily the action of the verb without a definite time association. In other words the mode of a verb is not only criterion to determine the tense of a sentence in which the very verb is used, but there are other evidences need to be used as well.³³ In Arabic there are three modes of verb:

1. *Al-Mâdî* (the past tense mode)

This mode expresses the action which has began and completed before the time of speech.³⁴ However, it might be used in the sense of present tense too for assuring the certainty of the action that happening at the time of speech.

Although the utterance of “making an offer (*îjâb*) and accepting an offer (*qabûl*)” to establish an agreement at the contract meeting is done in past mode it conveys present time meaning. For instance if the following expressions are uttered at the time of agreement: I sold (بعت), I bought (اشتريت), I endowed (وهبت), I married you (تزوجتك) and I married with you (تزوجت), they mean “I am selling,” “I am buying,” “I am endowing,” “I am marrying you” and “I am getting married with you” respectively. The only condition of their conveying present time meaning is to be uttered at the meeting of contract.³⁵ Al-Kâsânî says “in the custom of jurists this mode (past mode: *al-mâdî*) is used to make an offer (*îjâb*) in the present time, although it is established originally for the past tense.”³⁶

³² Bilgegil, M. Kaya, *Türkçe Dilbilgisi Edebiyat Bilgi ve Teorilerine Giriş*, Güzel Sanatlar Matbaası, Ankara 1964, p. 262-269; Gencan, Tahir Nejat, *Dilbilgisi*, Türk Dil Kurumu, İstanbul 1966, p. 187-199.

³³ Akyüz, Vecdi, *Arapçada Fiil Zamanları*, İstanbul Marmara Üniversitesi İlahiyat Vakfı Yayınları, İstanbul 1995, p. 12, 13, 17.

³⁴ Özbalkçı, Mehmet Reşit, *Arap Dilinde Zaman Açısından Fiiller*, İzmir 1996, p. 25, 31-36.

³⁵ Abbâs Hasan, *an-Nahwu'l-Wâfi*, I, 50; Özbalkçı, *Arap Dilinde Zaman Açısından Fiiller*, p. 65.

³⁶ Kâsânî, *Badî'u's-Sanâ'i' fî Tartîbi'sh-Sharâ'i'*, 1st edition, Dâru'l-Kutubi'l-İlmiyyah, Bayrût 1997, V, 133.



2. *Al-Mudâri'* (the present tense mode)

The Arabic grammarians have different opinions about *al-mudâri'*. The majority of them have the opinion that it can be used to express both the present and the future tense at the same time while some grammarians maintain the idea that it conveys only one of the present or the future tenses. There are five opinions on the issue:

- a) *Al-mudâri'* conveys only the future tense meaning. This is the opinion of Zajjâj (d. 311/923). Zajjaj sees the present as a very short time period which only divides the time past from the time future because while an utterance taking place the present time converts immediately to past.
- b) *Al-mudâri'* is for the present tense only. This is Ibnu't-Tarâva's (d. 528/1134) opinion. Since the action informed with *al-mudâri'* did not happened yet, when a sentence is articulated such as زيد يقوم غدا it means "Zaid intends to stand up tomorrow."
- c) *Al-mudâri'* is common between the present and the future that is to say its usage is equally genuine and valid for both present and future, not metaphorical for one and literal for the other. There is no need to look for any extraneous support to be able to use it for the one or the other, namely for the present or for the future. Sibawayhî (d. 180/796) and the majority of subsequent scholars are in agreement on this opinion. Nevertheless Abû Hayyân (d. 745/1344) relates that Sibawayhî had said that "There is a priority of present tense meaning in *al-mudâri'* if there is no other evidence."³⁷ If Sibawayhî really would have said this, it would be in contradiction with the idea that is related from him as *al-mudâri'* conveys both the present and the future tense equally, that is to say, if he accepted the latter he would not say the former. That is because if *al-mudâri'* is common between the present and the future and conveys the

³⁷ Al-Andalûsî, Abû Hayyân Muhammad ibn Yûsuf, *Irtishâfu'd-Darab min Lisâni'l-'Arab*, al-Qâhirah 1998, Maktabatu'l-Khanji, IV, 2029-30.



both equally, there would not be any reason to prefer one to another when there is no extraneous evidence. If Sībawayhî gives priority to the present tense meaning of *al-mudâri'* over the future, he must agree with the opinion that the real meaning of *al-mudâri'* is the present tense meaning. This means that Sībawayhî must have used the adjective of "common" in the capacity of literal meaning of the word but not a grammatical term in the sense that the *al-mudâri'* conveys the present and the future tense equally.

- d) *Al-mudâri'* is literal for the present and metaphorical for the future. The proponents of this opinion are Abû 'Alî al-Fârîsî (d. 377/987), Ibn Jinnî (d. 392/1002) and Suyûtî (d. 911/1505). According to these linguists, the particles of *س* and *سوف* are the signs of transferring the meaning of *al-mudâri'* to the future. The signs, such as suffixes, prefixes and infixes for femininity, plurality and duality are used to bring additional secondary meanings to the words. The particles of *س* and *سوف* should be understood in the vein of those additions for loading secondary meanings to the word. Thus for *al-mudâri'* the present tense meaning must be the primary/literal while the future tense meaning is the secondary/metaphorical.
- e) Ibn Tâhir maintains that *al-mudâri'* conveys literal meaning for the future while conveying metaphorical meaning for the present.³⁸

Al-mudâri' denotes 'only the present time meaning' or 'only the future tense meaning' as long as there are other presumptions for those alternatives. For instance it denotes only the present tense meaning if it is used with one of temporal adverbs such as *الآن* (now), *الساعة* (in this hour) *حالا* (immediately, now); or with *ليس* or one of the prepositions resembles to

³⁸ As-Suyûtî, Jalâlu'l-Dîn Abdu'r-Rahmân ibn Abî Bakr, *Ham'u'l-Hawâmi' fi Sharhi Jam'i'l-Jawâmi'*, edited by Ahmad Shamsu'd-Dîn, Bayrût 1998, I, 31-32; Abu'l-Fath Usmân ibn Jinnî, *al-Luma' fi'l-'Arabiyyah*, Bayrût 1985, p. 69-70.



it such as *إن* and *ما*; or when it is used as a predicate of an inchoative verb such as, *أخذ* and *طفق*, *شع*.³⁹

Al-mudâri' indicates the future tense meaning when it is used with a future tense adverb such as *إذا*; or some other particles such as *سوف* and *س*; or negative particle of *لا*; or with particles for jussive other than *لم* and *لما*; or with one of subjunctive particles *أن* *إذن* *لن*, *لكن*, *كي*.⁴⁰

Ibn Âbidîn maintains that according to the jurists, *al-mudâri'* is essentially established for the present tense meaning however there is a common usage of it for the future tense meaning metaphorically as well as literally.⁴¹ From this point of view a declaration of intent made in the mode of *al-mudâri'* must be a metaphorical one. Thus for the jurists *al-mudâri'*'s conveying of the present tense meaning entails to the condition of a presumptive that specifies its present tense meaning.

If there is no presumption that indicates that *al-mudâri'* is used for the present or for the future tense meaning specifically the equivalent of it should be the simple present tense which indicates an action that began in the past, happening now and will continue to happen in the future. That is to say it includes the past, the present and the future time meaning altogether.⁴² As a matter of fact, *al-mudâri'* is used in the meaning of simple present tense in the commentary of *Majalla*.⁴³

3. Imperative

Imperative (*amr*) is the mode of a verb that demands from the addressee to execute an action after the time of speech. This mode connotes the future tense meaning because the speaker of imperative demands from the addressee to perform an action which is not executed yet or to continue performing an action which has been executed but not completed yet. In both cases the action will be executed in the future time.⁴⁴

³⁹ Abbâs Hasan, *an-Nahwu'l-Wâfi*, I, 54.

⁴⁰ Abbâs Hasan, *an-Nahwu'l-Wâfi*, I, 55. 56.

⁴¹ Ibn 'Âbidîn, *Raddu'l-Mukhtâr*, IV, 12.

⁴² See Ediskun, Haydar, *Yeni Türk Dilbilgisi*, p. 180.

⁴³ Ali Haydar, *Duraru'l-Hukkâm Sharhu Majallati'l-Ahkâm*, Istanbul 1330, I, 260. Özbalıkçı, *Arap Dilinde Zaman Açısından Fiiller*, p. 116-117.

⁴⁴ Abbâs Hasan, *an-Nahwu'l-Wâfi*, I, 61, Özbalıkçı, *Arap Dilinde Zaman Açısından Fiiller*, p. 194.



V. Modes of Declaration of Intent

A declaration, to be considered as a founding element of an act, must be definite and earnest as well as unambiguous in indicating that action. If a declaration is not serious and explicit, in a degree that can not be taken as bargaining or as a promise for an agreement, can not be count as 'declaration of intent' and does not initiate any legal transaction.⁴⁵

Declarations of intent can be categorized as explicit (*sarîh*) and implicit (*kinâyah*) according to its power and precision in denoting intent. On a large scale, this power and precision is related to the tense and mode of the declaration: A mode that is established specifically to convey only present or only future tense meaning is called explicit while a mode that conveys the probability of both present and future tense meaning is called implicit.⁴⁶

VI. Categories of Explicit Declaration of Intent

A. *al-Mâdî* (the Past Tense Mode)

Islamic Legal scholars prefer the past tense mode, unanimously, for "making an offer (*ijâb*) and accepting an offer (*qabûl*)" which means declaration of intent.⁴⁷ The foundations of their preference are:

- 1) The past tense mode is the most definite mode of expressing intent that existing in the inner world of a person about an agreement. That is because it shows that the owner of that declaration has reached to the level of certainty after being in the levels of reflection, uncertainty and bargaining.⁴⁸ Thus the use of this mode in a declaration firmly indicates that there is no bargaining or a promise of agreement anymore but the intent of an agreement actually in existence.⁴⁹ That is why in the Qur'an the past tense

⁴⁵ Az-Zarqâ', Mustafa Ahmad, *al-Fiqhu'l-Islâmî fî Thawabihi'l-Jadîd*, Dimashq 1965, I, 318, 319, 332, 333; Ash-Shalabî; Muhammad Mustafâ, *al-Madkhal fî't-Ta'rîf bi'l-Fiqhi'l-Islâmî wa Qawâidil-Milkiyyati wa'l-'Ukûdi fih*, Bayrût 1985, d. 440.

⁴⁶ Siwâr, *at-Ta'bîr*, p. 313.

⁴⁷ Sanhûrî, *Masâdiru'l-Haq*, I, 85; Az-Zarqâ', *Madkhal*, I, 324; Siwâr, *at-Ta'bîr*, p. 313; Ash-Shalabî, *Madkhal*, p. 443.

⁴⁸ Sanhûrî, *Masâdiru'l-Haq*, I, 85; Gencan, Tahir Nejat, *Dilbilgisi*, p. 189.

⁴⁹ 'Alî al-Khafîf, *Ahkâmu'l-Mu'âmalât*, p. 188.



mode has been used many times for events that will take place in the future to designate the certainty of their manifestation.⁵⁰

In terms of certainty in designating meaning there is no mode stronger than the past tense. This is a reflection of linguistic rules as well as social customs. For instance in an auction sale when the salesperson says "I sell" it means "I am about to sell" and does not create any legal responsibility until he says "I sold" in the past tense mode. Islamic legal scholars are perfectly right in giving preference to the past tense mode because of its certainty in conveying the meaning. However, as Ibnu'l-Humam points out,⁵¹ although it is preferable, to confine the establishment of a legal act to the past tense mode only can not be accurate.

- 2) The Prophet (p.b.u.h.) has always used the past tense mode in agreements. According to scholars who maintain this foundation put forward rationale that making an agreement is a legal act that is related to the *Sharī'ah*, and the only the Legislator (*Shâri'*) would decide by which mode of speech an agreement should be established. The *Shâri'*, which is the Prophet (p.b.u.h.) in this case, had been used the past tense mode in his agreements. Thus an agreement should be recognized in past tense mode between the seller and the buyer.⁵²

However, the argument that the Prophet made all of his agreements by the past tense mode is not accurate. We know that there are some narratives showing that he made some of his agreements with imperative mode. For instance, Ibn 'Umar relates that: "I was in a journey accompanying the Prophet (p.b.u.h.). I was on 'Umar's young and cranky male camel. The camel was forging ahead often by jumping the queue and 'Umar was yelling at him to go back. When this had happened more than once the Prophet said: "Sell it to me." 'Umar replied: "It is yours, o Messenger of Allah." The Prophet repeated: "Sell it to me!" Upon this insistence 'Umar sold the camel to the Prophet (p.b.u.h.). Then the Prophet

⁵⁰ Al-Karadâghî, 'Alî Muhyî'd-Dîn, *Mabdau'r-Rizâ' fi'l-'Ukûd*, Bayrût 1985, II, 850; Yazır, *Hak Dini Kur'an Dili*, VII, 4625. For instance see Rûm 30/2; Kiyâmah 75/7, 8, 9; Mursalât 77/8, 9, 10, 11.

⁵¹ Ibnu'l-Humâm, *Fathu'l-Qadîr*, V, 75; Zayla'î, *Tabyînu'l-Haqâiq*, II, 96.

⁵² Al-Bâbartî, Muhammad ibn Mahmûd, *Sharhu'l-'Inâyah alâ-l-Hidayah*, (on the margin of *Fathu'l-Qadîr*), Bulâq 1315-1317, V, 75; Mullâ Khusraw, *Duraru'l-Hukkâm fi Sharhi Ghurari'l-Ahkâm*, Istanbul 1300, I, 406.



said: "O Abdullah, the son of 'Umar! Keep the camel, it is yours, and you can treat and train it as you wish."⁵³

In another *hadîth* Jâbir relates the following episode: "A slave came and expressed his allegiance to the Prophet as he wants to immigrate. The Prophet did not know he was a slave. When his master came to ask him the Prophet (p.b.u.h.) said: "Sell it to me." He bought this slave for the payment of two black slaves, and after this occasion he did not accepted anybody's allegiances without asking first whether they are slave or not."⁵⁴

These narrations approve that the argument that the preference of the past tense mode for declaration of intent is based on transmitted proof (*dalîl naqlî*) is not accurate. This is because, in these narrations there is no sign at all that the Prophet has renewed his initial offer "Sell it to me" which is in imperative mode by a past tense mode such as "I bought it". This means that the Prophet's speech of "sell it to me" in imperative mode was considered as a valid offering and the agreement was established by the acceptance of the other party.

It is well known that the Legislator (*Shâri'*) has maintained the most of previous Arab customs in Islam by adjusting them to new principles of legislation. In his interpretation of "by the Legislator" in the expression of Hidâyah's "The past tense mode (*al-mâdî*) is hold by the Legislator" Ibnu'l-Humâm says that "There was a custom of making agreements with this mode before Islam, and it has confirmed that custom."⁵⁵ This shows that the reason for the preference of the past tense mode in agreements by the jurist is a custom but not a revelation. Vahîdu'd-Dîn Sivâr who studied this issue in details also maintains the idea that the reason for the scholars' preference of the past tense mode should be the custom not the revelation.⁵⁶

Ahmad Fahmî Abu's-Sunnah, who has a comprehensive work on the Custom in Islamic law, maintains that the main criterion in determining whether a declaration of intension is literal or metaphorical is custom. He says that "Whether in the Legislator's speech or in the speech of the people who make an agreement, the speaker loads to his speech a

⁵³ Al-Bukhârî, Buyû' 47.

⁵⁴ Tirmizî, Buyû' 22, Ibn Mâjah, Jihâd, 41.

⁵⁵ Ibnu'l-Humâm, *Fathu'l-Qadîr*, II, 344.

⁵⁶ Sivâr, *Ta'bîr*, p. 316.



meaning that accords to the custom of the community that the speech has been articulated among them. (...) ... For instance, in an agreement of selling the rule is being established by the past tense mode by both parties of agreement. If the declaration of intent is established with a present tense mode there should be an additional provision that this declaration suggests only present tense meaning or has been used with the intent of the present tense meaning. The scholars of Islamic law have excluded the people of Harizm from this principle (the principle of the additional provision or the intent in a declaration made in the present tense mode) who used to use the present tense mode (*al-mudâri'*) for the present tense meaning only, that is to say that their declaration in present mode establishes an agreement without any additional provision or intent.⁵⁷

As we pointed out earlier, Abu's-Sunnah declares here that the custom can transform the meaning of an implicit and metaphorical expression into an explicit and literal one. It is true that *al-mudâri'* can be used for a declaration of intent subject of both the present and the future; because of the custom of the people of Harizm it became liable for a definite and explicit declaration of intent which establishes a legal agreement. Thus, if a mode of expression is used to use in establishing a legal agreement, that mode becomes an explicit means of expression just like the past tense mode. This is because a language is a common property of a community altogether, not belonging to only some of them or a class of it. The language is also a living organism. This organism, just like other living beings exhibits some changes during the course of time, and this is a natural and perfectly normal development.

The role of custom in changing the meaning of a declaration made with a metaphorical expression to an explicit is best articulated by al-Qarârâfi. For him, the testimony (*shahadah*) should be made with the present tense mode (*al-mudâri'*), the selling agreement with the past (*al-mâdî*), while the divorce with the past tense mode or with the form of active participle (*ismu'l-fâ'il*). If the past tense mode or the active participle form happened to be used for the testimony, or the present tense mode for divorcing they would not initiate those actions. This is because the use of different modes and forms for different legal actions depends on the custom of the people not on the jurists' whim. Thus, the meaning loaded to an utterance by the custom becomes an explicit meaning for that specific utterance. After this point, because of the explicitness in

⁵⁷ Abu's-Sunnah, *al-'Urfu wa'l-'Âdah*, p. 70.



signification of meaning, the judge can base his judgment on that specific utterance settled for that meaning by the custom; the *muftî* can give his *fatwâ* without further investigating the intent of the speaker.⁵⁸

“If the custom change in time and the past tense mode becomes current for the testimony and the present tense mode becomes current for establishing an agreement, the judge can base his decisions on those new modes, besides it would not be permissible to use the previous custom anymore. Consequently the differences between the modes of declaration of intent come from customs, and they would change according to the changes in customs.”⁵⁹

B. *al-Mudâri'* (the Present Tense Mode)

A verb articulated in the *mudâri'* form is potentially presumptive for present as well as for the future, unless specified for one of those alternatives by an additional indication.⁶⁰ Thus, it conveys its meaning metaphorically as long as there is no other determiner. This means that an agreement can not originate if a declaration is made by the *mudâri'* form because of the future tense implication in its meaning. In such a case it is considered that the aim of the declaration is to make a deal or promising for an agreement not the agreement itself. That is to say without confining *al-mudâri'*'s meaning to the present tense it is not considered as a declaration of intent, thus an agreement made such a statement is considered nonexistent. This means also a legal agreement can not be established with a statement in the *mudâri'* form with the prefix of *س* or the preposition of *سوف* which confine *al-mudâri'* to the future tense meaning.⁶¹

Al-Mudâri' indicates the present tense meaning in the following circumstances:⁶²

- 1) The use of *al-mudâri'* with one of adverb of time: *al-mudâri'* can be specified by an adverb of time such as الآن. For instance when a seller says أبيعك الآن “I am selling to you know” and the buyer

⁵⁸ Al-Qarâfî, *al-Furûq*, I, 53.

⁵⁹ Al-Qarâfî, *al-Furûq*, IV, 59, 60.

⁶⁰ Abbâs Hasan, *an-Nahwu'l-Wâfî*, I, 54.

⁶¹ Ibnu'l-Humâm, *Fathu'l-Qadîr*, V, 75-76; Al-Bâbartî, *al-'Inâyah*, V, 75; Ibn 'Âbidîn, *Raddu'l-Mukhtâr*, IV, 12; Ali Haydar, *Duraru'l-Hukkâm*, I, 261.

⁶² Siwâr, *Ta'bîr*, p. 321, 322.



responds *أشتري الآن* "I am buying now" a selling agreement becomes established between them.⁶³

- 2) The use of *al-mudâri'* for the present tense with external evidences: If *al-mudâri'* is used at marriage settlement it indicates a present tense meaning because this agreement is established after a period of engagement which provides enough time to the parties to think about the marriage before their decision. Since there is no prospect of interpreting a declaration made at the council of marriage as a promise or dealing with a reference to the future time, *al-mudâri'* must indicate a present tense meaning in the case of marriage agreement. In such a circumstance there are external evidences requires this interpretation of specifying the meaning of *al-mudâri'* to the present tense, such as inviting people to the ceremony, wearing wedding dress and gown by the parties of the agreement. These external evidences prevent the interpretation of *al-mudâri'* for the future tense meaning, and the agreement can be established with this mode, i.e. with the mode of *al-mudâri'*.⁶⁴

Regarding this issue Ibnu'l-Humâm says: "If a man says addressing to a woman *أتزوجك* "I marry with you" in the first person *mudâri'* and the woman responds as *زوجت نفسي* "I married with you" in the first person *mâdi'*, a marriage agreement concludes and becomes valid. In response to a man's statement in imperative mode *تزوجني بنتك* "marry your daughter with me" if a father says *فعلت* "I did" the agreement becomes established and valid (...) ... Since the marriage agreement is a non-dealing act *al-mudâri'* used in this agreement loads the present tense meaning only and leads to the establishment of the agreement. This is not because *al-mudâri'* is formed specifically for constituting agreements but because in this special circumstance it expresses the intent of the speaker for the agreement undoubtedly."⁶⁵

One of the external evidences to specify *al-mudâri'* to the present tense meaning is the intent of the speaker. If one uses *al-mudâri'* with the

⁶³ Al-Haskafi, Muhammad ibn 'Ali, *ad-Durru'l-Mukhtâr* (on the margin of *Raddu'l-Mukhtâr*), IV, 12.

⁶⁴ Abû Zahrâ', Muhammad, *al-Milkiyyatu wa Nazariyyatu'l-'Akd fi'sh-Shar'ati'l-Islâmiyyah*, Dâru'l-Fikri'l-'Arabî, al-Qâhirah 1976, see footnote # 2 at p. 211.

⁶⁵ Ibnu'l-Humâm, *Fathu'l-Qadîr*, II, 345.



intent of the present it indicates the present tense meaning because of this external evidence of intent. Kâsânî (d. 587/1191) says: "The offering and the acceptance can be done sometimes by *al-mâdî* and sometimes by *al-mudâri'* (...). The example of the *al-mudâri'*: a man's statement of أبيع منك هذا الشيء "I sell this thing to you for such and such" with the intent of offering, and the acceptance of the addressee by declaration of اشتريت "I bought it" or *vice versa*. Or, if a man says بعث "I sold it" in response to a man's statement of أشتري منك هذا الشيء بكذا "I sell this thing for such and such to you" with the intent of offering, or *vice versa*. With these statements all necessary elements of an agreement becomes existent and the agreement sets up. Here we take the intent in the consideration because there is a need to determine which meaning is the goal of the statement since it is customary to use the *أفعل* mode for the future as well although metaphorically."⁶⁶

Al-Mudâri' expresses the present tense meaning with evidence of intent. Ibnu'l-Humâm illustrates this as follows: "According to al-Marghinânî (d. 594/1197) an agreement can not be established with a future tense mode (*al-istiqbâl*). However this can be true only when the parties do not confirm each other about that the declaration is uttered for the present tense meaning. On the other hand, if the parties confirm each other that the declaration is made in this mode with the intent of originating a selling agreement, the agreement has been established accidentally with this declaration made in the future tense mode because the future tense mode can indicate the present tense meaning too. Thus the agreement can be established by intent (...). The example of this is that when a seller says with the intent of the offering أبيع منك هذا بكذا "I sell this to you for such and such" and the buyer says آخذه "I buy it" an agreement is considered to be established and completed. The mode of the future tense which can be used to establish an agreement with the intent of the present tense meaning is *al-mudâri'*... In terms of originating an agreement with the intent there is no differences between the utterance of بعث "I sold" and the utterance of أبيع "I sell." Thus, an agreement does not be established even with the utterance of بعث "I sold" if it is articulated as a joke. Hence al-Marghinânî's argument of "an agreement can be established by the *al-*

⁶⁶ Kâsânî, *Badâi'*, VI, 529.



mâdî only and can not be established the future tense mode” is meaningless.”⁶⁷

- 3) If a community is accustomed to use *al-mudâri'* in the present tense meaning this constitutes an evidence to interpret *al-mudâri'* in the present tense meaning. According to Ibn Nujaim (d. 970/1562) if the people of a region do not use *al-mudâri'* for the present tense meaning only there is a need to determine its time by the intent of the speaker; while the people of a region accustomed to use it only for the present tense meaning there is no need to do so as it is the case for the people of Harizm.⁶⁸ Thus, it is required to consider *al-mudâri'* as a literal and explicit declaration of intent when it is used in the present tense meaning in a people's custom.

There would not be any differences between *al-mâdî* and *al-mudâri'* when it is understood with the help of any presumption (*al-qarînah*) that it is used for the present tense meaning.⁶⁹ In fact, as explained earlier, *al-mâdî* which is preferred for the declaration of intent indicates the present tense meaning, when it is used for declaration of intent at the meeting of agreement.

There must not be any uncertainty about the use of the present tense in Turkish in a legal declaration. This is because the present tense in Turkish, unlike *al-mudâri'* in Arabic, does not convey the future tense meaning when it is used without a presumption confining its meaning for the present. To put forward the concerns about the Arabic *al-mudâri'* for the Turkish present tense should be considered making a measure with a difference (*qiyâs ma'al-fâriq*) without taking into account above mentioned differences between Turkish and Arabic. Hence, there should not be any doubt in establishing a legal agreement with the present tense in Turkish.

In this context, there is a need to explain an issue about the marriage agreement. The scholars of the Hanafi school says in the marriage agreement if the offering (*al-ijâb*) is made in the future mode the acceptance should be done surely in the past tense mode. Why this is so

⁶⁷ Ibnu'l-Humâm, *Fathu'l-Qadîr*, V, 76, Ash-Shalabî, Ahmad, *Hashiyah 'alâ Tabyîni'l-Haqâyi*, Bulâq 1314, IV, 4. Also see Ali Haydar, *Duraru'l-Hukkâm*, I, 260-261.

⁶⁸ Ibn Nujaim, Zaynu'd-Dîn Ibrâhîm, *al-Bahru'r-Râiq Sharhu Kanzi'd-Daqâiq*, Dâru'l-Kutubi'l-Ilmiyyah, Bayrût 1997, V, 264, 443.

⁶⁹ 'Alî al-Khaffî, *Ahkâmu'l-Mu'âmalât*, p. 189.



while the offering can be made in the future tense is a question needs to be answer. A closer look to the future tense gives the answer:

The word of *al-mustaqbal* (the future) in the Islamic legal sources is used for the future tense and constituted from *al-mudâri'* with no presumptive evidences for the present or *al-mudâri'* with س and سوف and imperatives as well.⁷⁰ The imperatives and *al-mudâri'* with presumptive evidences for the present tense can be used in offering in the marriage agreement while *al-mudâri'* with س and سوف can be used neither for offering nor for acceptance. The idea of the necessity of *al-mâdî* in acceptance of an offer made in *al-mudâri'* with no presumption for the present should be valid only in the case that it is used with the aim of imperative. However, the imperative is not useful for acceptance that is why it is a necessary to use *al-mâdî* in accepting an offer made in imperative. On the other hand since *al-mudâri'* is useful for both offering and accepting it must be valid to use *al-mudâri'* in accepting of a marriage offer made *al-mudâri'*, even with no presumption that it is used for the present, and the agreement should be established with this acceptance. As we already mentioned, due to its unique requirements, *al-mudâri'* used in the marriage agreement is considered to be an explicit expression. Moreover, if *al-mudâri'* is accustomed in a people's usage for both offering and accepting there would be no problem in using it in this sense, i.e. for both offering and accepting in a marriage agreement.

Finally, the structure Islamic law in general not in favor of formalism. The main principle is the idea that every legal act should be based on intent. The argument that in Islamic law the deceleration of intent is restricted to be made only with a specific form of verbs, i.e. with *al-mâdî*, is quite contradictory to its general approach. *Al-Mudâri'* which conveys present tense meaning, perfectly expresses a meaning explicitly and unambiguously just like *al-mâdî*, which conveys a past tense meaning, does. Islamic legal scholars have preferred *al-mâdî* for the declaration of intent in establishing a legal agreement just because of its certainty. This does not mean a declaration can not be realized other than this mode at all.⁷¹ Moreover, it is unlikely that the promoter of an approach who accepts the validity of an agreement even with a gesture, in certain circumstances, would advocate the idea of an agreement can not be established with *al-mudâri'*.

⁷⁰ See Ibnu'l-Humâm, *Fathu'l-Qadîr*, II, 345, V, 76.

⁷¹ Ibnu'l-Humâm, *Fathu'l-Qadîr*, V, 75, II, 344, 345, Zarqâ', *Madkhal*, I, 324.



C. *Al-Amr* (The Imperative Mode)

The mode of imperative conveys the future tense meaning. According to the scholars of the Hanafî School, because of this feature of the imperative a legal agreement can not be established with this mode. However it is accepted that in some exceptional circumstances it can be used to initiate certain types of legal settlement.

According to Hanafis the imperative mode can indicate a wish or a deal for a legal settlement but not a declaration of intent because of its conveying of future tense meaning. As pointed out by Ali Haydar, a commentator of Majallah, an imperative does not indicate the present tense meaning even if it is intended.⁷² The imperative mode designates only a future tense meaning just like *al-mudâri'* with prefix *س* or the particle *سوف*.⁷³ For instance, if a buyer addresses to a seller "sell this merchandise to me for such and such money" and the seller replies "I sold it," the agreement can not be completed unless the buyer verifies this by his statement "I bought it." The same rule applies if an offer is initiated by the seller with an imperative mode and it is accepted by the buyer, the agreement can not be completed until reaffirmation of the offer by the seller with a statement of "I sold it." This is because generally a selling procedure starts by bargaining. The settlement proceeds only after an agreement has been reached about the price of merchandise between the buyer and the seller. Thus a declaration of intent by an imperative mode does not convey the meaning of offering or acceptance but a desire to it. A desire of an offer or an acceptance can not be considered as the offer or the acceptance themselves. From this point of view, in the above mentioned examples the second declaration made in the *al-mâdî* form, in response to an imperative, is considered as an initiative offering. Hence, if there is no other declaration of intent comes from the other party of the same meeting; there exists only one of the two required declarations of intent for a selling agreement. And, this would not be enough to establish the agreement.⁷⁴

⁷² Ali Haydar, *Duraru'l-Hukkâm*, I, 262.

⁷³ *Al-Fatâwâ'l-Hindiyyah*, 3rd edition, Diyarbakır 1973 (Ofset), III, 4, Ibnu'l-Humâm, *Fathu'l-Qadîr*, V, 76.

⁷⁴ Jassâs, *Alhâmu'l-Qur'ân*, II, 129; Sarakhsî, *al-Mabsût*, XII, 109; Kâsâni, *Badâi'*, VI, 529; Ibnu'l-Humâm, *Fathu'l-Qadîr*, V, 75; Ali Haydar, *Majallah*, I, 263.



Nevertheless, the Hanafi jurists exempt the followings from the principle that an agreement can not be found on a declaration made in the imperative form:

1. Selling Agreement in Certain Circumstances

In a narrow framework, the imperative form is considered to be a valid as off certain verbs in a selling agreement. If the imperative form is one of those requires offering and acceptance before it a selling agreement can be established with it because in this case the imperative mode necessarily denotes a present tense meaning. For instance, if a seller says "Give the money" or "Benefit from it" in response to the buyer's statement "I bought this good from you for such and such money," the selling agreement establishes since the owner's expression of "Give the money" or "Benefit from it" necessarily connotes the statement of "I sold" has been told before it. In fact, the former two expressions are used in this context in the meaning of "I sold it, give the money" or "I sold it, benefit from it." Thus, the agreement has been established with an untold but implied statement of "I sold it" as a prerequisite of the expressions of "give the money" or "benefit from it" not by the expressions themselves.⁷⁵ Thus, the imperatives here are considered just like *al-mâdi*. However, *al-mâdi* denotes the establishment of the settlement directly with its dictionary meaning while the imperative with an additional meaning as a prerequisite of it.⁷⁶ Thus, the goal is not a formalistic insistence on the surface meaning of an utterance but to get the real meaning understood from it.⁷⁷

2. Marriage Agreement

According to Hanafis a statement made in imperative mode is accepted as a valid declaration of intent in marriage agreements. For instance, if a man addresses to a woman "Marry me with you" and the woman replies "I married you with me" the agreement establishes. The reasons for this result are:

⁷⁵ Ibnu'l-Humâm, *Fathu'l-Qadîr*, V, 75; Ali Haydar, *Majallah*, I, 263; Zarqâ', *Madkhal*, I, 375.

⁷⁶ Ash-Shalabî, *Hâshiyah 'alâ Tab'yîni'l-Haqâiq Sharhi Kanzî'd-Daqâiq*, IV, 4, Ibn Nujaym, *al-Bahrû'r-Raqâiq*, V, 443.

⁷⁷ Sanhûrî, *Masâdiru'l-Haq*, I, 93.



a. Textual Evidence

According to analogy (*al-qiyâs*) in Islamic law, the marriage agreement can not be completed with declarations which is one of them in the imperative the other in the *al-mâdî* modes since the imperative means a promise because of its future tense connotation. However, on account of the following narratives *al-qiyâs* is abandoned and the establishment of the marriage agreement with a declaration in imperative mode is validated as approbation (*istihsân*).

According to a narrative a companion of the Prophet, Bilâl, goes to a tribe and asks them to marry him with a woman from their tribe. When he has been refuted by them he says "If the Prophet did not order me to marry a woman from your tribe I would not come to you and say 'marry me'. Upon this, "You have been given" (املكت), they say. It is not narrated that Bilâl made a new declaration of intent by a reaffirmation of his request that he made previously in imperative form. If such a declaration was made by him it should be narrated us.⁷⁸

According to another narration, a woman gives herself to the Prophet as a gift but he does not accept this gift. In the meantime a man says to the Prophet "Marry her with me." The Prophet asks him what he would give to the woman as bride's price (*mîhr*). At the end of the story the Prophet says "I married her with you for your knowledge of the Quran" (زوّجتكها بما معك من القرآن). This means that the Prophet considered that an agreement has been established as a result of the man's utterances in imperative form as "marry her with me" and the declaration of himself as "I married her with you."⁷⁹

b. Non-Probability of Dealing in the Marriage Agreement

Unlike selling agreements there is no custom of dealing for marriage agreements. This is because, as mentioned earlier, the parties come to the meeting as they made their decision. In this circumstance the declaration made in the imperative form withdraws the probability of conveying a future tense meaning and the imperative mode indicates a declaration of intent. Thus a declaration made in the imperative form becomes an offer (*al-ijâb*), and when an acceptance comes immediately

⁷⁸ Sarakhsî, *Mabsût*, XII, 109; Kâsânî, *Badâyi'*, III, 323. See Jassâs, *Ahkâmû'l-Qur'ân*, II, 130.

⁷⁹ Al-Bukhârî, *Wakâlah* 9.



after it in *al-mâdî* form the agreement is considered to be completed and valid.⁸⁰

c. The Principle of Justice

The principle of justice requires that an imperative used in a marriage agreement should be considered as an offer (*al-ijâb*). For instance, if a father of a girl says "I married my daughter with you" in reply to a man addresses him as "Marry your daughter with me" and then declares that he changed his mind, the honor of the girl's father becomes damaged. To prevent this loss, a declaration of intent made in the imperative mode should be considered a valid offering (*al-ijâb*) and with acceptance of the father a bounding marriage agreement should be established.⁸¹

According to Ibnu'l-Humam this, i.e. to connect the validation of the imperative form in the marriage agreement as a form of offering to the damaging of the honor of the parents, is not proper. If this would be the case, it would not be permissible the man's recantation before the parents' acceptance of his offer, but this is permissible regardless the fact that the honor of the parents damages in this case too.⁸² We think Ibnu'l-Humam's challenge is credible since in all kinds of agreements it is permissible the recantation from an agreement before its completion by the declaration of the other party. Thus, an offer made in imperative mode should be considered as a valid declaration in a marriage agreement not because of preventing the damage on the honor of the parent but because of its definiteness in reflecting the intent of speaker about an agreement due to special conditions and customs of a marriage agreement.⁸³

However, some scholars bear the opinion that the imperative mode used in the marriage agreement is not an offer but giving a power of representation to the other party, thus a single declaration made by him establishes the agreement. This is because the marriage agreement is one of those agreements that representing both parties only a single individual's declaration of intent is permissible. In this type of agreement, the person who establishes the agreement can be a person who is one of the parties of the agreement itself while representing the other, as well as a representative of both parties. Since he has two legal capacities, his single

⁸⁰ Jassâs, *Ahkâmu'l-Qur'ân*, II, 130, Kâsânî, *Badâ'iyi'*, III, 323; Ibnu'l-Humâm, *Fathu'l-Qadîr*, V, 75; Zayla'î, *Tabyînu'l-Haqâyiğ*, II, 96.

⁸¹ Kâsânî, *Badâ'iyi'*, V, 530, Zayla'î, *Tabyînu'l-Haqâyiğ*, II, 96.

⁸² Ibnu'l-Humâm, *Fathu'l-Qadîr*, V, 76.

⁸³ Jassâs, *Ahkâmu'l-Qur'ân*, II, 130



declaration is considered to be both offering and acceptance (*ijâb* and *qabûl*) and the agreement would be established with a single declaration of him only.

According to this approach a statement made in imperative form is not an offering for the marriage agreement but giving the power of the representation. However this creates a discrepancy because if we accept the idea that it is giving the power of the representation there should not be a necessity that the representative should act the agreement with two witnesses in the same meeting where he accepted the power. Normally a representative can perform his duty in another time by the authority which has been given to him. Nonetheless the Islamic jurists point out that the authority of the representation is limited with the same meeting where it is accepted and two witnesses are obligatory for the validity of the agreement. This demonstrates that a declaration in the imperative form is an offer not giving a representative power to someone.⁸⁴

3. Statement in imperative mode is recognized as offering (*al-ijâb*) in the following agreements: divorce for goods (*hul'*), lay off (*iqâlah*), guarantee (*kafâlah*), donation (*hibah*) and discharge (*ibrâ'*).

If a person accepts in *al-mâdî* form an offer in imperative form such as "make *iqâlah* with me," "be guarantor for my credit to such and such person," "give that good to me as a gift," "forgive your credit to me" from by a person whom he made an agreement with him before, the agreements have been established. In *iqâlah* an offer made in the imperative form indicates a definite declaration of intent since there is no dealing in question in *iqâlah* agreement.⁸⁵

If these actions are considered as one-sided legal acts, in the acts of guarantee (*kafâlah*), donation (*hibah*) and discharge (*ibrâ'*), a declaration made in the imperative mode does not have a role in establishing an agreement since it is a call to offer but not the offer itself.⁸⁶ If they are considered to be two-sided acts we can say that: They are acts for the aim of donation (without expecting any return). If the creditor in the act of guarantee, the receiver of the gift in the act of donation and the indebted in the act of discharge makes an offer to the other party with an imperative mode, these are considered to be valid declarations of intent.

⁸⁴ 'Alî al-Khaffîf, *Ahkâmu'l-Mu'âmalât*, footnote at p. 191.

⁸⁵ 'Alî al-Khaffîf, *Ahkâmu'l-Mu'âmalât*, footnote at p. 192.

⁸⁶ 'Alî al-Khaffîf, *Ahkâmu'l-Mu'âmalât*, footnote at p. 191.



Upon these offers if the guarantor, the donator or the creditor put forward a declaration in *al-mâdî* form this establishes those contracts. This is because the one who put forward his declaration in imperative form is the one who receives some goods without paying anything, thus he can be excused about his declaration is being in an imperative form. In contrast, the one who guarantees with his money or goods, the donator or the creditor should make his declaration with an unambiguous *mâdî* form.⁸⁷

The Maliki jurists accept the imperative mode as a valid means of declaration of intent in all kinds of legal procedures.⁸⁸ However, a Maliki jurist Dusûkî (d. 1230) admits that a declaration made in the imperative form might be a metaphorical one like *al-mudâri'* though he prefers the majority's opinion that it is an explicit declaration of intent.⁸⁹ From the Shâfi'î scholars two opinions are narrated but they also prefer the validity of imperative in establishing a legal agreement.⁹⁰ There are two different views of the Hanbalîs too on the subject.⁹¹

It can be said that all legal scholars of Islamic law, except Hanafîs, are in agreement upon the imperative mode: They accept that all kinds of legal agreement can be established with a declaration in imperative mode as long as the customs of the parties allow to do so and as long as it indicates the intent of the parties with no doubt and ambiguity.⁹² We think that the opinion of the majority deserves the preference because there is no textual reference (*nass*) about the necessity of any certain mode, such as *al-mâdî*, to be used in legal agreements. In contrast the Qur'ân brings only one condition to acquire others' goods that is the consent of the owner. The mode of the declaration of consent or intent might be *al-mâdî*, *al-mudâri'* in the present tense meaning, as well as imperative because when one demands something with an imperative it means he has consent for it. As a matter of fact, the Prophet (p.b.u.h) used the imperative mode in some of his selling agreements.⁹³

⁸⁷ Siwâr, *Ta'bir*, p. 334.

⁸⁸ Ibn Rushd al-Hafîd, Muhammad ibn Ahmad, *Biâyyatu'l-Mujtahid*, Kahraman Yayınları, İstanbul 1985, II, 141; Ahmad as-Sâwî, *Bughyatu's-Sâlik li-Akrabi'l-Masâlik*, 1st edition, Dâru'l-Kutubi'l-Ilmiyyah, Bayrût 1995, III, 5; al-Baghdâdî, Abdu'l-Wahhâb ibn 'Alî, *al-Ishrâf 'alâ Nukati Masâil'l-Khilâf*, II, 526.

⁸⁹ Ad-Dusûqî, İbrâhîm, *Hâshiyah 'ala'sh-Sharhi'l-Kabîr*, Dâru'l-Fikr, III, 3, 4.

⁹⁰ Ash-Shirâzî, İbrâhîm ibn. 'Alî, *al-Muhazzab*, Matbaatu 'Îsâ al-Bâbî al-Halabî, Misr, I, 257; Ash-Shirbînî, Khatîb, *Mughni'l-Muhtâj ilâ Ma'rifati Ma'âni Alfâzi'l-Minhâj*, Dâru Ihyâi't-Turâsî'l 'Arabî, Lubnân, II, 5, III, 141.

⁹¹ Ibn Qudâmah, Abdullah ibn Ahmad, *al-Mughni*, Dâru'l-Fikr, Bayrût 1984, IV, 4

⁹² Ali el-Hafîf, *Ahkamu'l-Muamelat*, s.189; Siwâr, *Ta'bir*, p. 322, 323.

⁹³ See al-Bukhârî, Buyû' 34, Hibah 25, 26, Shurût 4; Muslim, Musâqât 109, Tirmizî, Buyû' 22.



Conclusion

All of Islamic legal scholars place *al-mâdî* mode in the first rank in terms of explicitness and accept it as the most powerful indicator of intent or inner consent. The rationale behind this idea must be the custom because a language is common property of a community. The individuals can load meaning to their declarations according to the customs of the community where their language is spoken. There is no textual evidence about the idea that the only the mode of explicit declaration of intent is the mode of *al-mâdî*. An accurate custom is one of the sources that our judgments or decisions should be based on in legal acts.

It would be more appropriate to identify the explanations that took place in Islamic legal sources for *al-mâdî* form as a preference not as a restriction. The other forms would gain also the privileged rank of *al-mâdî* while it can lose its position if the speakers of a language get used to use the other modes in declaration of intent. Such changes, just like in any other living beings, are natural phenomenon in languages.

The criterion to take in consideration in a declaration of intent should not be the mode or form of the verb but the meaning it reveals. As the rule of “the credit should be given to the aims and the meaning in agreements, not utterances or the form or structure” in the Majallah’s article 3 indicates in a declaration of intent the aim of speaker should be taken to the consideration not the forms or modes of his speech. As a matter of fact, based on this principle, it is accepted in Islamic law that a selling agreement can be established by mere exchanging things, too.

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